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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1128

WARDEN, MARYLAND PENITENTIARY,
Petitioner,

v.

HERBERT SMALLWOOD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Warden, Maryland Penitentiary, Petitioner, by Francis B. Burch, Attorney General of Maryland, and Fred Oken, Assistant Attorney General, prays the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals passed in this case on September 26, 1966. A motion for rehearing *en banc* was denied on November 28, 1966.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals for the Fourth Circuit are reported in *Smallwood v. Warden, Maryland Penitentiary,* 367 F. 2d 945 (1966) and appear in the Appendix herein at page 1a. The opinion of the United States District Court for the District of Maryland is unreported and appears in the Appendix at page 15a.

JURISDICTION

Jurisdiction is conferred upon this Court by Title 28 U.S.C., Section 1254(1). The judgment of the Court of Appeals was entered on September 26, 1966, and its Order denying the petition for a rehearing *en banc* was filed November 28, 1966. Issuance of a certified copy of the judgment in lieu of mandate was stayed by Order dated December 2, 1966, provided that an application for a Writ of Certiorari be filed in the Supreme Court within 90 days from November 28, 1966.

QUESTION PRESENTED

Was Smallwood's confession involuntary?

STATEMENT OF THE CASE

On findings of fact made by the District Court and adopted by the Court of Appeals, opposite conclusions were reached (by a divided court on appeal) regarding the voluntary nature of an oral statement by Smallwood confessing to the crime of murder. The findings of fact that resulted from testimony and other evidence offered at the hearing of Smallwood's petition for a writ of habeas corpus in the United States District Court on March 8, 1965, almost 12 years after the crime, were the following:

> "Clarence Wheeler, who operated a saloon a short distance from the house where Smallwood and his brother Robert lived, was beaten to death in the early morning of May 17, 1953, in the living quarters behind the saloon. The place was then ransacked and set afire.
>
> "Sergeant Walter Wilt of the Maryland State Police (then a trooper) began investigating the murder at 6:40 a.m. on May 17. He learned that a Luger automatic pistol and some money had been taken from the ransacked premises. He obtained a description of the pistol from the man who had sold it to Wheeler.

"While Wilt was at the scene of the crime, he was given a tip by an informer who had previously provided reliable information leading to the solution of a murder case. The informer told Wilt to check on Herbert Smallwood, and Wilt began to develop information about Smallwood's activities. Wilt knew that Smallwood had a criminal record and had recently been discharged from a penal institution. He learned that Smallwood had been drinking during the previous evening and had been seen around midnight at a tavern in the community where Wheeler and Smallwood lived. Wilt also learned that Smallwood had had a T-shirt washed at his sister's home on the morning after the murder.

"Having developed these facts, Wilt, with Lieutenant Brown, Trooper Coleman, Deputy Sheriff Cox, and State's Attorney Barbour, went to the house (about 2:00 p.m. on May 17) which Smallwood occupied with his brother Robert, who was also a suspect. As they approached the house, Smallwood came out, walking toward them; upon seeing the officers, he went behind the house, but shortly reappeared around the corner of the house and walked toward them. While the other men approached Smallwood, Deputy Sheriff Cox searched behind the house, found a Luger pistol, and brought it to the group in front of the house. Smallwood was arrested and taken to the police car, where the officers noticed certain stains on his shoes. They searched his shoes and found $83, including two blood-stained twenty-dollar bills, which were introduced in evidence at the trial.

"A cap which Smallwood said belonged to his brother Robert had been found at or near the scene of the crime, so Robert also was arrested. The brothers were taken to the office of the State's Attorney in the Charles County Court House and questioned there by Wilt, Coleman, Cox, and Barbour for approximately four hours.

"On May 18 the questioning was renewed at approximately 9:00 a.m. It continued until 4:00 p.m., with a

break around noon for lunch. At 4:00 p.m. Smallwood was taken back to the County Jail, given food and allowed to rest. The police noted certain discrepancies in the stories of Smallwood and his brother Robert, and suggested to them that they take lie detector tests. Both men indicated that they were willing. At 7:00 p.m. Smallwood was placed in a police car with his brother, Wilt, Coleman, Cox, and Sheriff Cooksey and taken to Washington. Smallwood knew that he and his brother were being taken to Washington for the purpose of having the lie detector tests taken. During the trip, which lasted about an hour and a half, there was little or no questioning. The brothers were taken to the Metropolitan Police Headquarters in Washington about 8:30 p.m., where they were questioned further by the officers until 12:15 a.m. on the 19th. At that time Smallwood was placed in the custody of Detective James K. McCarty of the Washington police, who asked Smallwood certain preliminary questions and then gave him a lie detector test after Smallwood had signed a statement indicating that he had been advised of his constitutional rights and was taking the test voluntarily.

"At the conclusion of the test, Smallwood was told that he was lying about certain key elements of the crime and that he should tell the truth. He replied that 'the machine had the answers and that should be enough'. At about 2:00 a.m., after further questioning by McCarty, Smallwood stopped denying that he was involved in the crime and told McCarty that he did not have any recollection of the murder because he was too drunk to remember. McCarty informed him that he had to have a recollection because otherwise the lie detector would not have registered physical reactions to certain questions. McCarty asked Smallwood if he would like to speak to one of the Maryland policemen and if he would feel more like telling the truth to them. Smallwood indicated that he would like to talk with Trooper Wilt, stating that he had been treated very nicely by him. McCarty called Wilt

in and told Smallwood that Wilt was the officer in charge of the case, whom Smallwood 'would have to look to, to handle the case for him in Maryland', and that Smallwood should tell him the truth. McCarty left the room while Wilt talked to Smallwood for about 20 minutes.

"Wilt testified at the trial that after the lie detector test he told Smallwood that 'in view of what the machine had shown, and in view of how he must feel, with a crime in his heart, and on his mind, . . . that if he could but get that off his heart, off his mind, he would feel better'. Smallwood asked Wilt what more they wanted when the machine had the answers. Wilt told him that they would like a statement from him, and when Smallwood indicated to Wilt that he would make a statement Wilt called McCarty back into the room. At that time Smallwood admitted being solely responsible from the crime, but still insisted that there were certain things about the case that he could not recollect.

"After this statement, McCarty asked Smallwood if he was willing to tell the story to the other Maryland officers and Smallwood agreed. McCarty called Cooksey, Cox, and Coleman into the room, and Smallwood made a statement very similar to the one that he had just made to McCarty and Wilt.

"At the request of McCarty, Smallwood agreed to tell the story to his brother, and he stated in his brother's presence that he was solely responsible for the crime and that he was sorry. McCarty asked Smallwood to tell his brother how he had been treated from the time he was arrested 'until the present', and Smallwood said that he 'had been treated as good as gold'.

"Wilt then a ked Smallwood if he would be willing to give a written statement to the same effect as the oral statement he had just made, and Smallwood agreed to do this. However, once the written statement was started, Smallwood indicated to the officers that he did not wish to continue and that he did not

want to sign a statement which set forth the facts he had already told them.

"The questioning in Washington was completed sometime between 4:00 a.m. and 5:00 a.m., and Smallwood was taken back to Charles County. On the afternoon of the 19th he signed a statement prepared by Wilt to the effect that he had been well treated during his interrogation, that he had not been offered any rewards or promises, and that he had not been threatened in any way.

"Mudd (F. DeSales Mudd, Esq., counsel appointed by the State court to defend Smallwood) testified at the hearing in this Court that he had been disturbed at the trial by Smallwood's apparent lack of concern. He therefore requested a psychiatric examination before sentence. Dr. Manfred S. Guttmacher conducted such an examination on September 2, 1953. Dr. Guttmacher concluded:

> 'This young colored boy is very seriously defective intellectually and can probably best be classed as a low grade moron. . . .
>
> 'This patient has sufficient intellectual capacity to know the difference between right and wrong and realize the nature and consequences of his acts. Our examination suggests that he is an amoral individual and functions at a very primitive level. There is evidence of strong aggressive, antisocial drives which apparently he keeps under poor control. No doubt, his capacity to control these is further reduced by the use of alcohol.
>
> 'In this examiner's opinion this patient is a seriously defective delinquent who is a real danger to society. If our law recognized the principle of partial responsibility, his mental deficiency might well be considered a mitigating circumstance. However, from a social point of view it increases his potential malignancy; and in consequence, it would certainly seem an unnecessary risk to release this man in the community, at any time in the foreseeable future.'

"The clinical psychologist who also examined Smallwood agreed with Dr. Guttmacher that Smallwood's intelligence was very defective. In his report he stated:

> 'The character structure brought out by the tests is crude, immature, and basically inadequate. His reactions are likely to be impulsive in the extreme, with no attempt at self-discipline. Several of his interpretations of the Roschach inkblots have a quality of violence; thus on Card II he sees "a cat with his head cut off", with "blood running from the neck", and on Card III, a human head with a "blood spot" next to it. This man is quite lacking in any moral principles that would restrain him from aggressive antisocial acts, and there is a strong prospect of violence in his behavior. Only considerations of immediate expediency would act as a deterrent.
>
> 'The general impression is of a mental defective with an extremely primitive, hostile character makeup, capable of a great deal of violence and lacking in any motivation to conform to social norms.'" (Apx. 2a-7a).

The majority opinion indicates that Smallwood's confession would have been adjudged voluntary except for the decision in *Davis v. North Carolina,* 384 U.S. 737 (June 20, 1966), where this Court said that an independent appraisal of the facts required an inference contrary to the finding of the lower courts on the same facts. Asserting *Davis* to be controlling here, the majority of the Court of Appeals, while admitting that the circumstances in *Davis* and other cases were more coercive, declared Smallwood's confession to be "the product of a will overborne".

Chief Judge Haynsworth, dissenting, points out that under the standards of voluntariness prevailing in 1953 when Smallwood made his confession, as well as for at least eight or ten years thereafter, the confession would

have been unassailable, and the actions of the police in connection with it beyond criticism.

He notes that this Court in *Johnson v. New Jersey*, 384 U.S. 719, 731, 733 "has clearly recorded its intention not to require the retrial of prisoners whose confessions were secured under procedures sanctioned by doctrine current at the time of trial or not forbidden by the reasonable implications of decisions then available for the governing of police conduct". To hold otherwise, says the dissenting opinion, is to put police officers everywhere on notice that if they conform to today's standards for the protection of constitutional rights, they nevertheless may be taken to task for their action tomorrow.

The dissenting opinion also points out that the length of Smallwood's interrogation was not a factor in his confession. It resulted from a lie detector test willingly, perhaps even eagerly, taken. Smallwood had yielded nothing to his interrogators. He had easily fielded every question tending to connect him with the crime. He grew more and more confident of his ability to frustrate the police. There is reason to believe that he considered himself more than a match for the lie detector. When the machine pinpointed his falsehoods, his confession followed.

The conviction of Smallwood for murder and his sentence of life imprisonment followed a jury trial presided over by two judges in the Circuit Court for Charles County, Maryland. He was represented by competent court appointed counsel, a former State's Attorney, who attacked the admissibility of Smallwood's confession with every weapon at his command. The issue was tested twice, the first time out of the presence of the jury. The court's instructions reflect the heavy burden on the State to prove the confession voluntary, and the right of the accused to have it

barred from evidence except for the strictest proof of voluntariness. The jury found the confession voluntary and Smallwood guilty of first degree murder.

Smallwood filed a motion for a new trial, contending again that his confession should have been rejected as involuntary. His counsel ordered, and the State provided, a transcript of the trial testimony of a State Police Trooper to whom Smallwood made his oral confession and the District of Columbia Police Department technician who administered the lie detector test. Although Smallwood testified both in the presence and out of the presence of the jury, his testimony was not transcribed because, as his lawyer declared, it did not help the defense. The motion for a new trial was denied.

Smallwood did not appeal his conviction. The circumstances suggest that the decision not to appeal was taken after sober reflection that a successful appeal could ultimately cost him his life.

A post conviction proceeding in the State court did not reach the question of the voluntariness of his confession. The issue was later raised in the Federal District Court together with six other claimed grounds of relief in a Petition for a Writ of Habeas Corpus. The District Court found all contentions to be without merit (Apx. 26a).

REASONS FOR GRANTING THE WRIT

I.

A CONFESSION WHICH WAS VOLUNTARY BY PREVAILING STANDARDS OUGHT NOT TO BE HELD INVOLUNTARY 13 YEARS LATER.

Smallwood's confession conformed to standards of voluntariness prevailing when it was made in 1953 and for years thereafter. To judge it anew by standards of recent vintage

threatens the finality of every criminal judgment except executed capital sentences.

Had Smallwood elected to promptly follow up his conviction by attacking the admissibility of his confession all the way to the Supreme Court, the confession would have withstood attack. Before and after 1953, confessions obtained under arguably more coercive circumstances were held voluntary. See *Lisenba v. California*, 314 U.S. 219 (1941); *Gallegos v. Nebraska*, 342 U.S. 55 (1951), a confession by a 38 year old Mexican farmhand who could neither speak nor write English; *Stein v. New York, Wissner v. New York, Cooper v. New York*, 346 U.S. 156 (1953) the interrogation of three suspects with prior criminal records for 12 out of 32 hours by relays of police officers; *Brown v. Allen*, 344 U.S. 443 (1953), a confession by an illiterate Negro after long confinement and before arraignment; *Thomas v. Arizona*, 356 U.S. 390 (1958), the confession of a 27 year old Negro made 20 hours after being twice roped and threatened with lynching; *Ashdown v. Utah*, 357 U.S. 426 (1958); *Crooker v. California* 357 U.S. 433 (1958).

II.

DAVIS v. NORTH CAROLINA, SUPRA, DOES NOT PROVIDE A "DESIGN FOR DECISION" HERE.

The most important factors from which a will overborne could be inferred in *Davis, supra*, are absent in the case at bar. Davis was not advised of his right to remain silent and to be represented by counsel. Smallwood was advised several times of his constitutional rights, his right to take or refuse a lie detector test. His signed acknowledgment was entered in evidence that he understood his constitutional rights and that he wanted to take the test.

Davis was detained for 16 days in a Detective Headquarters cell not equipped for long confinement. He was interrogated every day, once or twice a day, by two detectives specially assigned as interrogators. In addition, several sessions of interrogation were conducted by three other police officers. Davis lost 15 pounds body weight in 16 days. He was fed two "thin and dry" sandwiches twice a day. Smallwood was arrested at 2:00 p.m. on Sunday, May 17, 1953, and interrogated that day for about an hour, according to the State's evidence, or for four hours according to Smallwood. He was interrogated the next day for some ten hours or considerably less, again depending upon whether Smallwood's testimony at his habeas corpus hearing is believed or the testimony of the State's witnesses. It is undisputed that Smallwood confessed approximately an hour after a lie detector test was administered between 12:15 a.m. and 12:30 a.m. on May 19. It is also undisputed that in the 36 hours between Smallwood's arrest and confession he received ample food and rest.

Davis, on one occasion before his confession, was taken to Asheville, North Carolina, in an effort to shatter his alibi. Another time he was brought to the cemetery where the murder victim's body was found. It was anticipated that the emotional impact of such confrontation would cause him to confess the crime. There is no evidence that Smallwood was subjected to any psychological coercion whatever.

Davis claimed to have been beaten, threatened, coerced, and promised food and a hot bath to induce him to confess. Such elements are absent in the case at bar. During the habeas corpus hearing in the District Court, Smallwood claimed for the first time that the polygraph operator had threatened him, saying that he ought to have his head beat in like the dead man. The charge was disproved and dis-

credited, Smallwood's trial counsel testifying that he had never heard it before.

The only resemblance between the cases of Davis and Smallwood is that both men were about 23 years old when tried for murder, had low IQs, prior criminal experience, and rudimentary education — the fourth grade for Davis and the fifth grade for Smallwood. If Smallwood had any intellectual deficiency, it did not reveal itself at the trial where his demeanor was marked throughout by stoicism and indifference. Had he demonstrated inability to aid his defense, his competent and experienced trial counsel would undoubtedly have taken appropriate action.

The majority of the Court of Appeals strikes down Smallwood's confession for "the coercion of the utterer" lurking within, and for that Smallwood did not confess under circumstances "where his silence or speech, disavowal or avowal, was a ready option". The majority, without saying so directly, infers that it was intellectual deficiency, coupled with overlong interrogation, that were so coercive "as inherently and almost conclusively imputing overbearance of [his] volition and will". Smallwood, however, until the appeal in this case, has always relied on claims of threats, promises, and inducements and the pressures of interrogation as grounds to reject his confession, never any infirmity of intellect. Glossed over or ignored by the Court of Appeals was his familiarity with police procedures and techniques, lessons learned from earlier brushes with the law.

III.

A. NONVOLUNTARINESS OF SMALLWOOD'S CONFESSION WAS FOUND FROM DISPUTED FACTS.

IV.

B. THE UNDISPUTED HISTORICAL FACTS FAIL TO SUPPORT THE FINDINGS OF THE MAJORITY OF THE COURT OF APPEALS.

Disputed facts may not be relied upon in an appeal to reverse a determination that a confession was made voluntarily. Any conflict in testimony must be resolved in favor of the adjudication below that the confession was voluntary. *Thomas v. Arizona, supra; Gallegos v. Nebraska, supra; Haley v. Ohio,* 332 U.S. 596 (1948); *Ward v. Texas,* 316 U.S. 547 (1942).

The majority of the Court of Appeals summarized that Smallwood, a 23 year old, barely literate, high grade or low grade moron with a fifth grade education, was interrogated for four hours on the day of his arrest, detained in jail overnight, and questioned for six hours between 9:00 a.m. and 4:00 p.m. the next day with a break for lunch. He was permitted to rest between 4:00 p.m. and 7:00 p.m., then taken on a 1-1½ hour trip to Washington, D. C., interrogated to 12:15 a.m., when he was given a lie detector test and questioned further until 4:00 a.m. or 5:00 a.m.

These findings represent the unsupported testimony of Smallwood at the habeas corpus hearing on March 8, 1965, and they ignore the State's evidence to the contrary. Nor is there any evidence, aside from Smallwood's belated word, of four hours interrogation before the lie detector test. In this regard, the evidence shows a short inquiry for background information of the subject to be used in the test.

Throughout the findings of fact of the Court of Appeals regarding the interrogation of Smallwood, it is plain that their sole support is his testimony at the habeas corpus hearing. But Smallwood was labeled by the District Judge as "not a credible witness" (Apx. 16a). In any event, the probative value of testimony 12 years after the fact, particularly the self-serving testimony of a man under sentence of life imprisonment for murder, is tenuous indeed. The inability of Smallwood to illuminate the issue of his confession is reflected in a statement by his counsel that the reason Smallwood's trial testimony was not transcribed prior to the motion for a new trial was because it offered no support to the motion, the principal point of which was that the confession was coerced. The evidence that Smallwood, who now professes virtually total recall of the events surrounding his confession, had a complete failure of recollection of the same events when he testified in 1953, may be found in contemporary Washington newspaper accounts (Apx. 27a-33a). They are mute witness that when Smallwood testified two months after the crime, he had, or claimed to have, a lapse of memory which blacked out any recall of his arrest, interrogation, the lie detector test, or the confession.

CONCLUSION

". . . justice, though due to the accused, is due to the accuser also. The concept of fairness is not to be strained until it is narrowed to a filament. We are to keep the balance true". Justice Cardozo in *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). The Supreme Court has expressed elsewhere its duty to examine the entire record and make an independent determination of the issue of voluntariness. *Davis v. North Carolina, supra;* and cases there cited. This case begs for such review. To that end the Petitioner prays that certiorari may be granted.

Respectfully submitted,

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